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IN THE,

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 879

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION.

JOHN J. SCHMIDT,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondent.

FLOYD STUPPI,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel.

Dated March 27, 1964.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 879.

NORMAN MAYER,

Petitioner,

vs.

ILLINOIS NORTHERN RAILWAY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

1. Should the Court employ the writ of certiorari to review the adequacy of a $10,000 jury verdict, entered in favor of respondent's employee, where an evidentiary basis exists for assessing his damages at approximately $5,000, and a District Court and Court of Appeals have found the trial to be free from prejudicial error?

2. Should the writ of certiorari be employed to review the correctness of a District Court's rulings on the admission and exclusion of evidence applicable to a unique set of facts, where the record clearly shows and a Court of Appeals found said rulings to be free from prejudicial error and consistent with substantial justice?

3. Can a finding that petitioner received a fair trial, free from prejudicial error, made by the Court of Appeals,

upon application of Rule 61 of the Federal Rules of Civil Procedure to the record, be elevated to the status of "a decision in conflict with the decision of another court of appeals on the same matter", where that court and another Court of Appeals correctly applied Rule 61 but reached a different conclusion in unrelated, factually unique cases?

STATEMENT OF THE CASE.

On December 18, 1958, the day of the alleged accident and injury to petitioner's left knee, petitioner was employed as a yard helper, working a regular eight-hour day (T1-127) and earning $20.99 per day.

On January 20, 1959, the first treating physician, Dr. Vachout, stated that petitioner could probably return to his regular employment in ten days to two weeks (Pet's. Ex. 4, T4-340-342).

On the advice of his personal physician, Dr. Miller, petitioner returned to work on April 28 or 29, 1959. There was no evidence that he was examined by a physican of respondent's choosing or that he needed a "back-to-work slip" before returning to work. He did his regular work until August 28, 1959, at which time he again laid off (T1-149) and Dr. Miller performed surgery on petitioner's knee (T2-264.)

While petitioner was undergoing postoperative care by Dr. Miller, the doctor noted the following about the condition of his left leg and knee:

> September 26, 1959—No swelling or effusion; stopped physiotherapy.
>
> October 2, 1959—Condition excellent.
>
> October 9, 1959—Condition improving; quadriceps muscles strong.
>
> October 16, 1959—No swelling, no pain; quadriceps muscles strong.

October 20, 1959—Knee excellent.

November 13, 1959—Slight swelling; condition excellent.

December 19, 1959—No pain or complaint of pain and no swelling or effusion.

January 18, 1960—No swelling; quadriceps muscles strong.

March 21, 1960—No swelling; slight pain (T2-290-293.)

The operation performed on Petitioner—removal of a cartilage from the left knee—is a common one, normally resulting in a three- or four-month time loss from work, according to petitioner's own physician (T2-297-299).

In February of 1960, Dr. Miller felt that petitioner was able to return to his regular work and so advised him (T2-288-289). At the time of trial, Dr. Miller felt that petitioner was capable of doing normal or ordinary work as early as the first part of 1960 (T2-307).

The only medical expenses incurred by petitioner, for which he became personally liable, amounted to about $750. (T2-285, 345). These resulted from his decision to be treated by a physician of his own choosing, Dr. Miller.

Petitioner last sought or received medical treatment in March of 1960, two years before the trial (T1-153-163). Although he claims he did not seek treatment because he was unable to pay for it (T1-153), petitioner was entitled to be treated by Dr. Vachout, an independent practitioner designated by respondent, free of charge (T1-184, T2-329).

The late Dr. Arthur A. Conley, an orthopedic surgeon, with considerable experience in treating railroad employees, examined petitioner postoperatively, for the first time, on December 27, 1960 (T4-10, 75). On that date, Dr. Conley observed that petitioner did not limp; that his left leg muscles had returned to normal development and normal

power; that his left knee had a full and complete range of motion; that there was no swelling, abnormal motion or instability in that knee; and that a preexisting arthritis in that knee did not affect the weight-bearing parts of the joint (T4-21-26). Dr. Conley observed that petitioner was then fit to return to his regular work or that of a railroad fireman (T4-29-30, 40).

Dr. Thomas D. Hall, an impartial medical examiner, examined petitioner, on June 2, 1961. He was of the opinion that petitioner could have carried on the job of a locomotive fireman or a towerman, or many other types of ordinary work (T5-53-55). The longest period of disability following a cartilage removal to which the doctor testified was three or four months (T5-45). He also testified as follows:

> "Q. Anyone you know advise keeping him at rest for three years?
>
> "A. No, I never heard of anything like that." (T5-52.)

Dr. Sidney Sideman, another impartial medical expert, found petitioner had normal extension and flexion, muscle power and control, and stability in his left leg and knee (T8-30-31). He found that petitioner could return to his regular work (T8-72).

Although petitioner had worked as a yardman and switch tender for the last several years, he had previous railroad experience as a yard clerk, caller in a freight house, and inspector in the refrigerator department, and was qualified as a locomotive fireman (T1-186-187, 193).

Between December 18, 1958 and the time of trial, petitioner's regular work was available to him as well as other jobs with the defendant—such as car man, at a rate of $2.59 per hour (T7a-7-8); towerman, at $2.43 per hour (T7-600); clerk, at $18.20 to $19.70 per day (T7-601-602); or locomotive fireman, at $22.16 per day (T7-603).

Up to the time of trial, he had not made an effort to return to his regular work or to obtain other employment with the respondent or anyone else (T1-184-185, 193; T2-244).

ARGUMENT.

I.

THE WRIT OF CERTIORARI SHOULD NOT BE EMPLOYED, IN A FEDERAL EMPLOYERS' LIABILITY ACT CASE, TO REVIEW THE ACTION OF A DISTRICT COURT OR COURT OF APPEALS IN DENYING A MOTION FOR NEW TRIAL BASED ON THE ADEQUACY OF A JURY VERDICT. THIS IS PARTICULARLY TRUE WHERE, AS HERE, THERE IS AN EVIDENTIARY BASIS FOR THE JURY'S VERDICT.

Stripped to its one basic essential, petitioner's argument for granting the writ can be summed up in the words: "*The jury did not award me as much in the way of money damages as I believe I was entitled to.*" Although this lament is being heard with less frequency in this day of the "adequate award", it is not novel or unique.

Despite this Court's admonition that the petition should completely disclose the real nature of the controversy, when applying for certiorari, (*Southern Power Co.* v. *Pub. Serv. Co.*, 263 U. S. 508, 509 [1923]; *Furness, Withy & Co.* v. *Yang-Tsze Ins. Ass'n.*, 242 U. S. 430, 433 [1916]) petitioner has shied away from the nub of his case and set up the straw-man of "conflicting decisions of courts of appeal in applying Rule 61 of the Federal Rules of Civil Procedure." This matter will be covered in Part III of our brief.

"The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that damages awarded by the jury were excessive or were inadequate." *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481 (1933).

In *Fairmount Glass Works* the jury awarded plaintiff nominal damages of one dollar, in an action on a contract where it had proven damages in excess of $18,000. The trial court refused to grant a new trial. The Court of Appeals reversed the trial court and ordered a new trial. 59 F. 2d 539 (7th Cir. 1932). In answering plaintiff's argument that his motion for new trial presented an issue of law, subject to review on appeal, this Court held:

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict. In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." 287 U. S., at 485.

In meeting the argument that refusal to grant a new trial was an abuse of the trial court's discretion, and hence reviewable, the Court said:

> "The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar polity." 287 U. S., at 485.

In three earlier F. E. L. A. cases, this Court has held that the power, and with it the duty and responsibility, of dealing with the adequacy of a jury verdict rested upon the courts below. *Louisville & Nashville R. R. Co. v. Holloway*, 246 U. S. 525, 529 (1918); *St. Louis & Iron Mountain*

Ry. v. *Craft*, 237 U. S. 648, 661 (1915); *Southern Railway Co.* v. *Bennett*, 233 U. S. 80, 87 (1914).

The Court of Appeals for the Seventh Circuit has adhered to the rule that it will not review a judgment for excessiveness of damages and held that, "Where the damages awarded are alleged to be inadequate the same rule must be applied." *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d 77, 80 (7th Cir. 1952). However, as a matter of actual practice, that court has reviewed the adequacy of a verdict for the sole purpose of determining whether "a clear or manifest abuse of sound judicial discretion by the trial court" has been shown. *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d at 80; *Bucher* v. *Krause*, 209 F. 2d 576, 586 (7th Cir. 1953); cert. denied 345 U. S. 997 (1954); *Thomas* v. *S. H. Pawley Lumber Company*, 303 F. 2d 604, 608-609 (7th Cir. 1962).

In the case at bar, the Seventh Circuit Court of Appeals examined the record and said:

> "In this case there is a conflict in the evidence on the nature and extent of plaintiff's alleged injuries and damages. On the record before us this court cannot say as a matter of law or fact that the jurors were activated by passion, prejudice or corrupt motive, or that they committed a gross error or that the trial court committed a clear or manifest abuse of sound judicial discretion in denying plaintiff's motion for a new trial." 324 F. 2d 154, at 155.

Even if this Court were prone to examine the record on damages in this case, it is obvious that there is an evidentiary basis for the verdict.

In determining whether a verdict is inadequate, petitioner's damages should be computed upon the basis most favorable to respondent. *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. at 480; *Flener* v. *Louisville & N. R. Co.*, 198 F. 2d at 80. Petitioner does not quarrel with this rule.

Viewing petitioner's damages in a light favorable to respondent, but still giving petitioner the benefit of several doubts, the following damages were proven at trial:

Hospital bill (T2-345)	$ 399.56
Dr. Miller's bill (T2-285)	350.00
Initial period of time loss— (T1-149, T2-342)	1,364.35
Second period of time loss (T2-342)	3,184.50
	$5,298.41

The second period of time loss is based on the testimony of petitioner's own physician, who testified that he felt petitioner was ready to return to work in February or March of 1960, approximately 30 weeks after the operation. (T2-288-289, 307). All of the examining doctors who evaluated petitioner's condition felt he could do his regular work (T4-29-30; T8-72), work as a locomotive fireman or a towerman, or do many types of ordinary work. (T4, 40; T5-53-55.)

In petitioner's brief supporting his motion for a new trial, he conceded to the trial court that hospital and doctor bills and lost wages "to the earliest date he could possibly return to work" amounted to $7,750.00 (R. 243). In the court of appeals, he argued that lost wages alone amounted to $11,188.20. Now he suggests that this element of damages could reach $20,208.20 (Pet. p. 20). In so doing, he is certainly not viewing the evidence in a light favorable to respondent.

As the court said in *Klegsteuber* v. *Pittsburgh, Chartiers & Y. Ry. Co.*, 118 F. Supp. 390 (W. D. Pa. 1954), in ruling on the plaintiff's charge that the verdict was inadequate:

> "The jury had a right to believe the testimony of defendant's doctors to the effect that plaintiff could resume his duties as brakeman." 118 F. Supp. at 392.

In *Larsen* v. *Chicago & N. W. R. Co.*, 171 F. 2d 841, 845 (7th Cir. 1948) it was said:

> "Moreover, it is now well settled that the fixing of the amount of damages in an action for personal injuries is peculiarly within the province of the jury, there being no regular standard by which to measure."

II.

THE WRIT OF CERTIORARI SHOULD NOT BE EMPLOYED TO REVIEW RULINGS ON EVIDENCE AND TO DISCUSS SPECIFIC FACTS. THE TRIAL COURT AND COURT OF APPEALS AGREED THAT THE RECORD IS FREE FROM ERROR AFFECTING PETITIONER'S SUBSTANTIAL RIGHTS.

This Court has long held that it will not grant certiorari to review evidence and discuss specific facts. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 (1938); *United States* v. *Johnston*, 268 U. S. 220, 227 (1925); *Houston Oil Co. of Texas* v. *Goodrich*, 245 U. S. 440, 441 (1918). Application of this rule to the case at bar is warranted. Here, we are not dealing with the question of whether a case was properly taken from a jury but with the question of the adequacy of its award. The evidence rulings complained of were reviewed by the trial court and the Court of Appeals. The Court of Appeals found:

> ". . . that no legal error intervened which either prejudicially affected a substantial right of the plaintiff or deprived him of a fair trial." 324 F. 2d at 156.

Petitioner's contention that Rule 61 does not apply to excluded evidence is sheer folly. This can be demonstrated by merely quoting the first sentence of Rule 61:

> "No error in either the admission *or the exclusion* of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial

> or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." (Emphasis ours.)

This rule is intended to be applied in both the district courts and the courts of appeal. *Gillis* v. *Keystone Mut. Casualty Co.*, 172 F. 2d 826, 830 (6th Cir. 1949).

In *McCandless* v. *United States*, 298 U. S. 342 (1935), cited by petitioner, this Court applied the test now incorporated in Rule 61, when it said:

> "This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (Italics theirs.) 298 U. S. at 347-348.

A brief look at the rulings petitioner complains of is sufficient to attest to the fact that they were not prejudicially erroneous.

A. Witness Traylor's Testimony Was Not Prejudicial; It Merely Answered That of Petitioner and His Witnesses.

Petitioner, in redirect examination, testified that subsequent to his injury he asked the Respondent's Claim Agent, McWilliams "if there was not something else [he] could do around the railroad" aside from switchman's work. He said that McWilliams told him "no", that "the company doesn't do that any more". (T2-236.) Petitioner further said that when he asked McWilliams for work he did not specify any particular type of work around the railroad (T2-239). The alleged conversation with McWilliams was corroborated by petitioner's wife, who set the time as the "early part of 1959"; she said her husband asked "if

there wasn't some other kind of work that he could do." (T7-728.)

In an effort to show that it would have been futile for him to have gotten another job with the respondent anyway, petitioner testified that if he took a job as a fireman or a yard clerk he would start on the bottom of the seniority list in either craft. He also indicated that he would not be working steadily because he would be on the extra board in either craft (T2-237-238). Petitioner's witness, O'Connor, general chairman and local chairman of the Brotherhood of Railroad Trainmen, also testified that there is an extra board of firemen who were not working regularly and that the same is true in any field of work insofar as operation work is concerned with the railroad (T3-376-377). However, petitioner had to admit that all he had to do to get his job back was to "report for work". (T3-382.) He in fact returned to work in April of 1959, more than 30 days after he first laid off without taking a physical examination and without receiving a back-to-work slip from a company-appointed doctor.

All of the doctors who treated or examined petitioner were of the opinion that he was capable of doing his regular work, or work as a locomotive fireman, a towerman or many types of ordinary work (T2-288-289, 307; T4-29-30, 40; T5-45, 52, 53-55; T8-72).

The evidence clearly showed that petitioner was capable of working as a switchman, fireman, yard clerk, towerman or of doing other ordinary work (T1-186-187, 193).

The only thing that remained to be shown was that these jobs were available to petitioner. Indeed, that was the only objection petitioner's counsel made when Dr. Conley was asked whether petitioner was able to do the work of a fireman. Counsel said:

> "Mr. Dooley: That is objected to unless they are able to show that job was open for him and that he could have had it." (T4-40.)

Mr. Traylor's testimony was offered to show that that job and others were open for petitioner and that he could have had them. The testimony was material and relevant, in view of petitioner's qualifications and medical opinion concerning his ability to work. The testimony was relevant for another reason as well—petitioner made it relevant by introducing testimony to the effect that he asked for other work and was refused by an agent of the respondent.

The respondent was not limited in its rebuttal to merely showing that the alleged conversation with McWilliams did not take place. The conversation to which petitioner testified, and the testimony petitioner introduced about the extra boards, tended to prove (1) that petitioner was ready and willing to do work other than switching; (2) that the respondent in fact refused to give him the opportunity to do such work; and (3) that it would have been futile to take such work because he would have been an extra man, not regularly employed. Respondent was entitled to rebut any or all of these inferences.

Petitioner cannot be sincere in arguing that it was error to show that other jobs were available to him in 1959, when it was he who complains that he asked for such work in early 1959 and was refused.

It is clear that a person seeking to recover damages under the F.E.L.A. must do that which a reasonable man would do under the circumstances to limit the amount of the damages. *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. at 489 (1916). Where a person claims he is unemployable in his regular work, he is duty bound to seek other employment which he is capable of doing. *Alexander* v. *Meiji Kaiun K.K.*, 195 F. Supp. 831, 834 (E.D. La. 1961); *St. Louis-San Francisco Ry. Co.* v. *Bridges*, 131 So. 99, 159 Miss. 268 (1930), cert. denied 283 U. S. 848 (1930).

B. Petitioner Was Not Prejudiced by the Court's Rulings Excluding Evidence.

On pages 18-19 of his petition, petitioner argues that it was error to prohibit witness O'Connor from testifying about an alleged custom of the respondent, outlined in petitioner's counsel's "so-called" offer of proof.

The testimony to which an objection was made (T3-362) and sustained (T3-371) had nothing to do with the purported offer of proof. The petitioner never put any part of the so-called offer of proof to any witness in the form of a question. He did not make a proper offer nor did he get a ruling on it.

In the Court of Appeals petitioner did not argue that the trial court's ruling on O'Connor's testimony was error. He merely discussed that testimony under the heading "The Prejudicial Testimony of the Witness Traylor".

Bowman v. *Robinson*, 16 F. 2d 240, 241 (C.C.A. 9, 1926), the only federal case cited by petitioner, holds that it is not error to exclude testimony about, ". . . the policy of the company relative to employing men who have been injured". *Bowman* is applicable to exclude the offered "policy" testimony of witness O'Connor. It is not applicable to witness Traylor's testimony which merely rebutted that of petitioner.

Whether petitioner should have asked for a job was a fact question for the jury in this case. It was his duty to minimize his damages. *Ambrose* v. *Norfolk Dredging Co.*, 284 F. 2d 802, 803 (4th Cir. 1960). All of the other aspects of petitioner's employment status with the respondent are controlled by a contract between the respondent and petitioner's union. Petitioner's counsel had actual knowledge of the contract but he chose not to offer it in evidence (T3-366).

This Court can take judicial notice of the fact that questions concerning the petitioner's existing employment rights are determined by the Railway Labor Act, 45 U.S.C.A. § 152(11) *et seq.*, *Allen* v. *Southern Ry. Co.*, 114 F. Supp. 72, 73 (W.D., N.C. 1953); and that such questions arising under provisions in the collective bargaining agreement are of a specialized technical nature calling for administrative decision by experts in the field, *Penn. R. Co.* v. *Day*, 360 U. S. 548, 553 (1958).

C. Cross-Examination About Petitioner's True Age and His Efforts to Seek Medical Care in a Case of Alleged Continuing Disability Is Material to the Issues and Not Erroneous.

In his complaint petitioner alleged severe and permanent injuries (R. 7). In his opening statement, petitioner's counsel said the evidence would show that petitioner was 52 years old in December of 1958 (T1-150). Petitioner testified that he was born on August 16, 1906 (T1-119) and that he had a birth certificate which he would produce in court to prove it (T1-192). However, he never did produce it.

Petitioner introduced life expentancy data on a man of his claimed age (T2-335) and asked for and received an instruction of the subject (R-197). At the close of the case, petitioner's counsel argued that petitioner was 52 years old in December of 1958 (T9-13). Counsel referred to petitioner's life expectancy in arguing future lost wages and also argued that petitioner would have pain "as long as he lives." (T9-29-30.)

In considering petitioner's evidence and argument, it becomes obvious that his true age is material to the issue of damages. In the case of an alleged permanent injury and permanent disablement from work, as we have be-

fore us, the length of time petitioner's damages would continue is of uppermost importance.

If petitioner was 64 years of age at the time of his accident and testified that he was 44 years old, the enormity of the falsehood is immediately apparent. In this case respondent impeached petitioner with two employment applications, made in his own writing, three years apart, where he stated he was born on August 16, 1902 (T1-190-191). The four-year difference in age would certainly have some effect on future damages. The trial judge recognized this in his ruling on the point, when he said:

> "The Court: This is a special application, in view of the fact of the question of how much more working life he has is involved." (T1-190.)

Petitioner discusses alleged error in questioning him about frequenting "Murphy's Tavern."

It should be pointed out that petitioner did testify that he ceased going to Dr. Miller because he didn't have the money to pay him (T1-153). This testimony was being introduced to explain why petitioner, with an alleged permanent and painful condition, had not seen a doctor for treatment for two years prior to the trial (T1-153, 163).

In this case, where the need for additional medical care was in issue, the respondent was entitled to show that petitioner had access to free medical care and that he had sufficient funds to procure that care elsewhere. His access to free medical care was shown by the evidence (T1-184, T2-329). Respondent's attempt to show that petitioner had funds available for medical care, if he desired it, was stopped by the court because of its mistaken view of the evidence.

When we opened up the subject, preliminary to attempting to show regular expenditures for alcoholic beverages, at a time during which Petitioner claimed he could not afford

medical attention, we were stopped by an objection (T2-230). Petitioner's counsel erroneously informed the court that:

> "Mr. Dooley: He did not say that he could not afford medical."

The court apparently having forgotten the testimony on the point, or not having heard it, replied:

> "The Court: I never heard him say he could not afford it. He said he had not received any, and he said he had not sought any." (T2-231.)

Upon the court sustaining the objection, the subject was not pursued any further.

We were not permitted to answer an issue raised by plaintiff; he could not have been harmed by evidence which should have but did not go into the record.

D. The District Court Has the Power To Appoint Two Impartial Medical Examiners and in Doing So in This Case Properly Exercised Its Judicial Discretion.

It should be noted that petitioner does not complain that the testimony of either impartial medical examiner was erroneous. He merely argues that the District Court did not properly administer the impartial medical program (Pet. p. 24).

One of the questions presented in *Ex Parte Peterson*, 253 U. S. 300 (1919) was whether a federal district court possessed the inherent power to supply itself with an impartial expert's testimony when it deemed such testimony necessary in the interest of justice. This Court answered that question in the affirmative.

There is no doubt that this inherent power of the district court continues intact today and applies to the appointment of impartial medical experts. *Scott* v. *Spanjer Bros., Inc.*, 298 F. 2d 928, 930-931 (2nd Cir. 1962).

The Court of Appeals for the Seventh Circuit has recently recognized the right of a district court to order more than one physical examination of a plaintiff. In *Ishler* v. *Cook*, 299 F. 2d 507 (7th Cir. 1962), it was said that:

> "The Court may order more than one physical examination of a plaintiff in an action based on personal injury to obtain the full truth concerning the matter in controversy." 299 F. 2d, at 511.

Rule 20 of the Civil Rules of the United States District Court for the Northern District of Illinois, under which we moved for the impartial medical examination complained of, does not in any way impinge on the inherent power of the trial judge in this field. The rule expressly recognizes that the trial court may, in its judgment, order one or more impartial medical examinations. The rule merely sets forth some additional procedures whereby the court may more easily arrange for impartial medical experts and whereby the parties themselves may be the moving forces.

Rule 20(a) provides for "an examination (physical, medical, psychiatric, *either or all*) . . . . by an impartial medical expert *or experts* . . ." (emphasis ours).

Rule 20 makes the granting or withholding of an order for an impartial medical examination entirely "discretionary with the court". The order is to be granted "if, in the judgment of the court such an order will be in the interest of justice and will materially aid in the just determination of the cause."

Applying the foregoing principles to this case, it is at once apparent that the trial court did not commit prejudicial error in ordering a second physical examination.

There were at least five pretrials of this case, prior to the appointment of the first impartial medical examiner, Dr. Thomas D. Hall (R. 95, 101, 103, 105, 115). No pre-

trial order was handed down and the proceedings in chambers were not reported. However, both parties and the trial court are in agreement on the essential facts which led to our asking for the first impartial medical examination.

During the course of the pretrials, which commenced on January 10, 1961 (R. 95), Petitioner let it be known that it was the opinion of Dr. Robert G. Addison, an orthopedic surgeon to whom he was referred by his counsel, that he should have his left patella removed (Deposition of Dr. Addison, pp. 5, 61; Def. deposition, Exhibit 8). This was our first notice of this claim and it created a conflict in medical opinion on the subject. The first impartial medical examination was sought by us primarily for the purpose of resolving this conflict. The court recognized this and Petitioner concedes it to be the case (T8-3-5).

Dr. Hall's report was devoid of any mention of the future fate of Petitioner's left patella; it left the conflict for which the case was referred to him completely unresolved. In addition, the doctor's findings were so predicated upon the history given by Petitioner and his subjective complaints that the parties were not apprised of what the doctor's opinion would be in court, where he would be limited to testifying to objective findings (Ptff's. App. 1a-5a).

The only recourse open to us was to once more petition the trial court, pursuant to Rule 20, which we did (R 137-141). After having heard argument on the motion, the trial court entered an order re-referring the case to the Illinois State Medical Society, pursuant to Rule 20(a)(2) (R. 163). Dr. Sidney Sideman was then designated by the Society to conduct the second examination.

As the trial court said, "the record clearly shows that it wasn't because the first medical report was adverse [to

Respondent] that a second medical report was sought" (T8-7). The fact that the trial court exercised a sound judicial discretion in ruling on our motion for a second impartial medical examination is summed up in the trial judge's spontaneous answer to certain remarks of Petitioner's counsel:

> "Mr. Dooley: . . . Of course, they had nothing to lose by coming in here and getting a second report, and if that is true then any time you get an adverse report you could come in and ask for a second report.
>
> "The Court: Not in my court you can't, and if the situation hadn't been presented to me that this report, as written, indicated it was largely based on history and subjective symptoms, and if it hadn't been indicated to me that the necessity for an impartial medical in the first place was a question of the removal of the patella, they wouldn't have got a second examination before me. Nobody is coming in to my court and get another impartial medical examination because they do not like the findings in the first one." (T8-9.)

Both impartial examiners found petitioner able to return to work. Dr. Hall said he could have carried on the job of a locomotive fireman or a towerman, or many other types of ordinary work (T5-53-55). Dr. Sideman said he could return to his regular work (T8-72). The fact that both doctors testified on the point does not constitute prejudicial error.

There may be only a few instances in which one can conceive of the need for a second impartial medical examination. However, the facts certainly dictated the necessity in this case. Plaintiff was not prejudiced by the reexamination.

III.

PETITIONER HAS NOT DEMONSTRATED THAT THE COURT OF APPEALS HAS RENDERED A DECISION IN THIS CASE IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS IN THE SAME MATTER.

The third question presented by petitioner is:

> "3. Which of conflicting decisions at Court of Appeals level are to control the application of Rule 61 to evidence admitted or excluded in actions under the Federal Employers' Liability Act?" (Pet. p. 3.)

However, in arguing the point, we find that his real complaint is about "The manner in which Rule 61 was applied here . . ." (Pet. p. 20).

Petitioner cites three cases in Part II of his petition, in support of the thesis that there is a conflict among the circuits in interpreting Rule 61: *Sears* v. *Southern Pacific Co.*, 313 F. 2d 498 (9th Cir. 1963); *Schillie* v. *Atchison, T. & S. F. Ry.*, 222 F. 2d 810 (8th Cir. 1955); and *Rice* v. *Louisville & N. R. Co.*, 309 F. 2d 930 (6th Cir. 1962).

None of those cases involves an interpretation of Rule 61. Indeed, the rule is not mentioned in any of them. However, in deciding each of those cases, the three Courts of Appeals did exactly what the Court of Appeals did in the case at bar; namely, they reviewed the record for prejudicial error. In *Sears* the Court said:

> "The question remains whether the exclusion of this exhibit was prejudicial." 313 F. 2d at 503.

In *Rice* the Court found:

> "The plaintiff was prejudiced thereby in his right to have a fair trial on the real issue involved, and the judgment of the District Court is vacated and the case remanded for a new trial." 309 F. 2d 934.

In *Schillie* it was said:

> "The rule of evidence of the state in which the case was tried must therefore be applied. Since the evidence was not admissible under the Missouri rule its admission in this case was error. Its admission was no doubt prejudicial." 222 F. 2d at 818.

In each case, upon the record before it, the courts found that the conduct complained of was erroneous and prejudicial. On the record before them in the case at bar, the District Court and Court of Appeals found it free of prejudicial error.

The mere fact that Courts of Appeal, upon reviewing unrelated, factually dissimilar cases in the light of Rule 61, are not uniform in arriving at decisions in favor of or against every plaintiff who comes before them, does not create a real conflict between those courts. *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387 at 393 (1923).

CONCLUSION.

Petitioner has failed to demonstrate that any special and important reason exists for reviewing this case on a writ; nor has he demonstrated that any of the reasons expressly stated in Rule 19 of this Court exist. Petitioner merely wishes to have his case reviewed and a new trial granted because he feels the jury verdict rendered herein was inadequate. His petition should be denied.

Respectfully submitted,

JOHN J. SCHMIDT,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Attorney for Respondent.

FLOYD STUPP,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago, Illinois 60604,
Of Counsel.